of the letter of appointment by the agent as asserted by her, she came back to Malaysia to give instructions to her solicitors. In either way the defendant knew of the issue and service of OS 3563 but she intended to evade service of the same. This point is substantiated by her admission in her second affidavit in reply dated 2 October 1989 where she said that in the last five years she had not been in Malaysia for more than two months. This statement clearly shows that she did visit Malaysia on and of although she said she had not stayed in the country for more than two months.

In arriving at the aforesaid conclusions, I also took note of the significant fact that she affirmed her first affidavit dated 19 June 1989 in support of her application to set aside the issue and service of OS 3563 *before a Commissioner of Oath in Kuala Lumpur.* In the absence of any explanation, the only logical inference that could be drawn is that the defendant was in the country when the said OS was served on her by substituted service on 29 February 1989. Furthermore the second affidavit in reply of the defendant was prepared by her solicitors while she was still in the country and it was intended that she affirmed the said affidavit before a Commissioner of Oath in Kuala Lumpur because the word 'Before me . . . Commissioner of Oaths Kuala Lumpur' were typed in that affidavit. If as she claimed she was not in the country why would her solicitors type the said words in the said affidavit? All they need to do was to advise the defendant the substance of the affidavit in reply and let her affirm it before a Notary Public in Paris. In such a state of affairs I am more than convinced that at all material times the defendant, Astrid Saniman, was in Malaysia and she knew about the issue and service of OS 3563. She deliberately left Malaysia after filing her application to set aside the said OS to evade service of the same.

Finally I agree with what Mr Low had said in his affidavit, viz the fact that the defendant gave a c/o address in Paris which was different with the c/o address given by her husband when in the common course of human conduct the defendant would be living with her husband at the same place is a clear indication that the defendant deliberately gave a deceptive address at which she could not be contacted even had the plaintiff applied to serve the OS 3563 out of jurisdiction pursuant to O 11 of the Rules of High Court 1980. By giving such a deceptive address it confirms that the defendant deliberately went abroad to evade service.

From the evidence stated above I am fully satisfied that the defendant, Astrid Saniman, was still in the country when OS 3563 was issued and she deliberately avoided service of the same. In any case I am fully convinced that her departure from the country was to evade service of the said OS.

In the circumstances I dismissed the application of the defendant to set aside the issue and services of OS 3563 with costs. The defendant will have 21 days from today to file her affidavit if she intends to defend the action instituted against her.

Application dismissed.

Solicitors: *Azman Davidson & Co; Shearn Delamore & Co.*

Reported by *Mathavan Devadas*

Hu Sepang v Keong On Eng & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO P 1569 OF 1985
LIM BENG CHOON J
18 SEPTEMBER 1990

Civil Procedure — Statement of claim — Striking out — Principles to be applied — Rules of the High Court 1980, O 18

Tort — Breach of statutory duty — Damage occasioned by failure of police to perform statutory duty

Police — Duty to protect life and property — Duty to maintain the peace — Police Act 1967, s 3

The plaintiff was assaulted at the Malacca State Assembly Building in the presence of the first defendant, an inspector of police, and the second defendant, the Chief Police Officer of Malacca. The plaintiff subsequently brought an action for damages against the first and second defendants claiming that they had failed to render assistance to the plaintiff and were in breach of their statutory duty to prevent the assault. The government of Malaysia was joined as third defendants. The defendants applied to strike out the statement of claim on the grounds that the action did not reveal any cause of action. The registrar dismissed the application, and the defendants appealed.

Held, dismissing the defendants' appeal:

(1) The power to strike out an action on disclosing no reasonable cause of action is a summary power which should only be exercised in plain and obvious causes. So long as the statement of claim disclosed some cause of action or raised some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

(2) Where a cause of action is based on breach of statutory duty the plaintiff must show that (a) the injury suffered was within the ambit of the statute; (b) the statutory duty imposed a liability to civil action; (c) the statutory duty was not fulfilled; (d) the breach of duty had caused the injury.

(3) A statute may impose a duty towards persons generally, in which case no question can arise of whether the plaintiff is within the class protected.

(4) Where a statute offered a power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy would lie.

(5) Where the loss is occasioned by a failure to exercise a power coupled with a discretion there is no liability. But a

plaintiff is still entitled to compensation if he can prove that there had been malicious refusal to exercise a discretionary statutory power.

(6) If a statute creates a duty but imposes no remedy civil or criminal for its breach, there is a presumption that a person who is injured thereby will have a right of action, for otherwise the statute would be but a pious aspiration.

(7) The Police Act 1967 confers powers on the police for the maintenance of law and order, the preservation of peace and security and the prevention of crime and the giving of assistance in the protection of life and property. The Act, however, is silent as regards a police officer being subject to civil or criminal liability for his failure to carry out his duties.

(8) Even if the first and second defendants were of the impression that the assault was a private matter they should have paid heed to the plaintiff's requests for help and have at least intervened to maintain peace and order in the State Assembly Building.

(9) The averments in the plaintiff's pleadings clearly alleged that the defendants had been negligent in the performance of the duties which they owed to the plaintiff. Although the word 'negligence' was not used, the defendants could not have been caught by surprise by such an omission.

[Bahasa Malaysia summary

Plaintif telah diserang di Bangunan Perhimpunan Negeri Melaka di depan defendan pertama, seorang inspektor polis, dan defendan kedua, Ketua Polis Negeri Melaka. Plaintif kemudiannya membawa tindakan untuk gantirugi terhadap defendan pertama dan kedua. Beliau mendakwa bahawa defendan telah gagal memberikannya bantuan dan telah mengingkari tugas statutori mereka untuk mencegah serangan itu. Kerajaan Malaysia telah dicantum sebagai defendan ketiga. Defendan memohon untuk membatalkan pernyataan tuntutan itu atas alasan bahawa tindakan itu tidak menunjukkan sebarang kausa tindakan. Pendaftar telah menolak permohonan itu dan defendan membuat rayuan.

Diputuskan, menolak rayuan pihak defendan:

(1) Kuasa untuk membatalkan (strike out) sesuatu tindakan kerana tidak menunjukkan kausa tindakan yang munasabah adalah satu kuasa terus (summary power) yang harus dijalankan hanya dalam kes-kes yang jelas dan terang. Selagi pernyataan tuntutan itu menunjukkan sesuatu kausa tindakan atau membangkitkan beberapa soalan yang sesuai untuk diputuskan oleh seorang hakim, hakikat bahawa kes itu lemah dan tidak mungkin berjaya bukanlah alasan untuk membatalkan kes itu.

(2) Bila satu kausa tindakan berdasarkan keingakaran tugas statutori, plaintif mesti menunjukkan bahawa (a) kecederaan yang dialami adalah di dalam lingkungan statut itu; (b) tugas statutori itu mengenakan satu tanggungan kepada tindakan sivil; (c) tugas statutori itu tidak dilaksanakan; (d) keingkaran tugas itu telah mengakibatkan kecederaan itu.

(3) Suatu statu boleh mengenakan tugas terhadap orang-orang pada amnya. Dalam kes sedemikian tiada soalan yang timbul sama ada plaintif itu adalah dalam lingkungan kelas yang dilindungi.

(4) Bila satu statut menawarkan satu kuasa bersama dengan satu tugas untuk menjalankannya, kegagalan berbuat demikian adalah satu keingkaran tugas itu yang mewujudkan suatu remedi.

(5) Bila kerugian disebabkan oleh kegagalan menjalankan kuasa bersama dengan budibicara tiada tanggungan timbul. Tetapi plaintif masih berhak mendapat gantirugi jika beliau boleh membuktikan bahawa terdapat keengganan dengan niat buruk untuk menjalankan suatu kuasa statutori berbudibicara.

(6) Jika satu statut mewujudkan satu tugas tetapi tidak mengenakan remedi sivil atau jenayah untuk keingkarannya, terdapat anggapan bahawa seseorang yang dicederakan akan mempunyai satu kausa tindakan, kalau tidak statut itu akan menjadi impian semata-mata.

(7) Akta Polis 1967 memberikan kuasa kepada polis untuk menegakkan undang-undang dan peraturan, menjaga keamanan dan keselamatan dan mencegah jenayah dan memberi bantuan dalam melindungi nyawa dan harta. Akta itu, walau bagaimanapun, tidak menyebut tentang seorang pegawai polis dikenakan tanggungan sivil atau jenayah untuk kegagalan menjalankan tugasnya.

(8) Biarpun defendan pertama dan kedua berfikir bahawa serangan itu adalah satu perkara persendirian mereka harus mengambil perhatian tentang permintaan plaintif untuk bantuan dan harus sekurang-kurangnya bercampur tangan untuk menjaga keamanan dan peraturan di dalam Bangunan Perhimpunan Negeri.

(9) Pernyataan (averment) di dalam pliding plaintif jelas mendakwa bahawa defendan telah lalai dalam menjalankan tugas yang terhutang kepada plaintif. Walaupun perkataan 'negligence' tidak digunakan, defendan tidak mungkin diperangkap secara mengejut berikutan dengan itu.]

Cases referred to

1 *Drummond-Jackson* v *BMA* [1970] 1 WLR 688 (folld)
2 *Schacht* v *The Queen in Right of the Province of Ontario* (1972) 30 DLR (3d) 641 (folld)
3 *Great Central Railway Co* v *Hewlett* [1916] 2 AC 511 (folld)
4 *David* v *Abdul Cader* [1963] 1 WLR 834 (folld)
5 *Cutler* v *Wandsworth Stadium Ltd* [1949] AC 398 (folld)
6 *Dorset Yacht Co Ltd* v *Home Office* [1970] 2 WLR 1140 (refd)
7 *R* v *Metropolitan Police Commissioner, ex p Blackburn* [1968] 1 All ER 763 (distd)
8 *Hill* v *Chief Constable of West Yorkshire* [1988] 2 All ER 238 (distd)
9 *Donoghue* v *Stevenson* [1932] AC 562 (folld)
10 *Dutton* v *Bognor Regis Urban District Council* [1972] 1 QB 373 (refd)

Legislation referred to

Police Act 1967 s 3
Rules of the High Court 1980 O 18

Oh Choong Ghee for the plaintiff.
Mohd Yussof bin Johor Ali (Senior Federal Counsel) for the defendants.

Cur Adv Vult

Lim Beng Choon J: This is an appeal against the decision of the senior assistant registrar of this court ('the SAR') given on 9 February 1990 dismissing the defendants' application made by way of summons-in-chambers pursuant to O 18 r 19 of the Rules of High Court 1980 to strike out the writ action instituted by the plaintiff and to stay all proceedings in the action pending the disposal of defendants' application. It is impor-

tant to note that although in their application to strike out the writ action the defendants had asserted therein that they would rely on all the four grounds specified in the said O 18 r 19(1), nevertheless in his submission at the hearing before the SAR on 18 October 1989, the senior federal counsel representing the three defendants submitted that he would rely only on the ground that the writ and statement of claim of the plaintiff had not revealed any cause of action; hence the defendants had not filed any affidavit in support of their application as they were precluded from doing so under sub-r (2) of O 18 r 19.

The law relating to the summary process of striking out an action on the ground that the statement of claim does not show a cause of action is succinctly stated by Lord Pearson in *Drummond-Jackson* v *BMA*.[1] I need to reproduce only the more pertinent passages of Lord Pearson's judgment at p 695:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim on disclosing no reasonable cause of action is a summary power which should be exercised *in plain and obvious cases*. (Emphasis supplied.)

and at p 696:

> In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the evident intention of the rule for several reasons. First, there is in para (1)(a) of the rule the expression 'reasonable cause of action', to which Lindley MR called attention in *Hubbuck & Sons Ltd* v *Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, pp 90-91. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by para (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle* v *Feilden* [1966] 2 QB 643 Danckwerts LJ said at p 648:
>
> 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.'
>
> Salmon LJ said, at p 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment, seat unless the case is unarguable.'

On the authority of the above case it is clear that so long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by a judge the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

Let us therefore examine the relevant averments of the plaintiff in his statement of claim. First, in para 4 thereof the plaintiff claimed that on 17 September 1985 he was at the Malacca State Assembly building at about 2.50pm to witness the DAP Assemblyman for Durian Daun who was to move a motion to adjourn the House to discuss an urgent matter of public importance. Secondly, in para 5 thereof the plaintiff averred that when he entered the public gallery of the Assembly, he was forcibly restrained by a person unknown to him. He was dragged, punched and pushed out by the said person together with three other persons unknown to the plaintiff in the presence of the first defendant, Inspector Keong On Eng who despite repeated requests by the plaintiff, failed to apprehend the persons referred to herein before. The plaintiff also said that the second defendant, the Chief Police Officer, Malacca who went to the scene, likewise failed and/or refused to apprehend the plaintiff's assailants despite repeated requests made by the plaintiff. Thirdly, in para 6 thereof the plaintiff said that the first and second defendants failed to carry out their duties as required of them pursuant to their oath of office. The two defendants failed and/or refused to render assistance to the plaintiff to which assistance the plaintiff was lawfully entitled and that the two defendants failed in their duty owed to the plaintiff in not apprehending the persons who assaulted him or to take immediate steps to ensure the plaintiff was not assaulted. The plaintiff thereafter lodged a report at the Balai Polis Melaka Tengah. Lastly, in para 8 thereof the plaintiff said that he had suffered humiliation, loss and damage. He therefore prayed for damages, costs and any further relief or other relief deemed fit and proper by the court. The third defendant was sued in its capacity as the employer of the two defendants and therefore vicariously liable for their failure to render assistance to the plaintiff or to prevent the plaintiff from being assaulted.

From the pleadings of the plaintiff there is no doubt that he firstly pegged his cause of action on breach of statutory duty on the part of the first and second defendants. It has been said that to establish civil liability for a breach of statutory duty the plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled, and (d) the breach of duty has caused his injury — see Cl*erk* & *Lindsell on Torts* (14th Ed) para 1581. I should also bear in mind that a statute may impose a duty towards persons generally in which case no question can arise of whether the plaintiff is within the the class protected. Furthermore it is also necessary to bear in mind that where a statute confers power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. An interesting case advocating this proposition is the case of *Schacht* v *The Queen in Right of the Province of Ontario*[2] to which I shall revert to later in this judgment. On the other hand, where the loss is occasioned by failure to exercise a power coupled with a discretion there is no liability — see *Great Central Railway Co* v *Hewlett*.[3] But a plaintiff is still entitled to compensation if he can prove that there had been malicious refusal to exercise a discretionary statutory power

— see *David* v *Abdul Cader*.[4] Finally I must remind myself that if a statute creates a duty but imposes no remedy civil or criminal for its breach, there is a presumption that a person who is injured thereby will have a right of action for otherwise 'the statute would be but a pious aspiration' (per judgment of Lord Simons at p 407 in *Cutler* v *Wandsworth Stadium Ltd*[5]).

It is quite clear that the statutory duty of which the plaintiff is complaining that the defendants had breached is encompassed in the Police Act 1967 (Act No 41 of 1967). It is to be noted that the said Act confers powers on the police for the maintenance of law and order, the preservation of peace and security of the Federation, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence (see s 3 sub-s (3) thereof). Coupled with these powers a police officer is required to perform certain specific duties. I need only mention the duties pertinent to this case and they can be found in sub-s (3) of s 20 of the said Act which reads:

> (3) Without prejudice to the generality of the foregoing provisions or the provisions of any other law, it shall be the duty of a police officer to carry out the purposes mentioned in sub-section (3) of section 3; and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including —
>
> (a) apprehending all persons whom he is by law authorised to apprehend;
>
> ...
>
> (j) giving assistance in the protection of life and property;

It is also relevant to note that failure on the part of a police officer to carry out his duties will subject him to disciplinary action. The said Act is silent as regards to a police officer being subject to civil or criminal liability for his failure to carry out his duties.

Reverting to the averments of the plaintiff I must assume that he could prove the allegations made by him in his pleadings if the case goes on trial. The question then is whether on that assumption the defendants would be liable in damages — see Dorset *Yacht Co Ltd* v *Home Office*[6] at p 1145. The averments of the plaintiff which are very relevant are that as he entered the public gallery of the Malacca State Assembly building at 2.50pm on 17 September 1985 he was restrained by a person unknown to him who bodily and severely assaulted him in the presence of the first defendant. Despite his repeated requests for help the first defendant chose to do nothing. Later three more persons not known to the plaintiff joined in assaulting the plaintiff. Likewise when the second defendant came to the scene he too did nothing notwithstanding repeated requests for help by the plaintiff. In such a situation it is manifestly clear that the first if not the second defendant should pay heed to the plaintiff's requests for assistance. Even assuming that the assault was a private matter they should at least intervene to maintain peace and order in the Malacca State Assembly building even if they were in doubt whether they had the right to apprehend the persons assaulting the plaintiff. The senior federal counsel in his written submission asserted that no member of the public could dictate the manner in which the police went about the investigation and prosecution of a crime. To that I agree to a certain extent. But in the present case the plaintiff had been severely assaulted by the four persons in the presence of the first and second defendants. The plaintiff was not asking the two defendants as to how they should exercise their discretion — all he was asking was that the police should perform their duties to stop the assault which to my mind is a simple and reasonable request bearing in mind the circumstances of the case. Let us take the matter further by using a hypothetical case. Suppose a houseowner in a situation of emergency telephoned the police stating that he saw four persons trying to break into his house to commit what he suspected was robbery. Could the police who received such a message choose to do nothing? The answer is a definite 'no'. How the police chose to act is a matter for them to decide but to refuse to act is certainly a breach of their statutory duty. To lend support to my proposition I would like to cite firstly the case of *Schacht* v *The Queen in the Right of Province of Ontario*.[2] In that case the police were under a statutory duty to maintain patrol along the highway and to warn motorists of hazards. They failed to warn the plaintiff of a hazard which had come to the knowledge of two policemen and they were held equally responsible with the plaintiff for damages he sustained.

Turning to the submission of the senior federal counsel representing the defendants, the crux of his submission is that public policy requires that a police officer should not be liable merely for failure to act in a manner preferred by an individual. I agree with his proposition but in the present case the plaintiff was not and had never asked the police to act in a manner dictated by him — all he asked was to require the police to intervene in the assault and to maintain peace and order particularly in the august body of the Malacca Legislature Assembly. The learned senior federal counsel relied on three authorities to support his contention. I need only to mention two of the authorities as the third authority has got nothing to do with the performance of police duties and which authority merely expounded general principles relating to breach of statutory duties which are clearly impossible to catalogue. The first case relied by the learned senior federal counsel is *R* v *Metropolitan Police Commissioner, ex p Blackburn*.[7] To my mind that case is of no assistance to the defendants. In that case the appellant was challenging the directive of the Commissioner of Police directing

the police not to take proceedings against gambling clubs for breach of gambling laws unless there were complaints of cheating or they had become haunts of criminals. The appellant in that case would possibly succeed in getting a mandamus to compel the Commissioner of Police to take proceedings against all gambling clubs for breaching the gambling law if not for the revocation of the directive. In the judgment of Lord Denning at p 766, his Lordship made this instructive observation:

> If this argument were correct, it would mean that insofar as their most important function is concerned, the police are above the law and therefore immune from any control of the court. I reject that argument. In my judgment the police owe the public a clear legal duty to enforce the law — a duty which I have no doubt they recognize and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene.

The next case relied by the learned senior federal counsel is the case of *Hill* v *Chief Constable of West Yorkshire*.[8] In the case the plaintiff was questioning as to the manner in which the police exercised their discretion in apprehending a certain suspect from committing murders and attacks on young female victims. In holding that the plaintiff had no cause of action the court held at p 238:

> In the absence of any special characteristic or ingredient over and above reasonable foreseeability of likely harm which would establish proximity of relationship between the victim of a crime and the police, the police did not owe a general duty of care to individual members of the public to identify and apprehend an unknown criminal, even though it was reasonably foreseeable that harm was likely to be caused to a member of the public if the criminal was not detected and apprehended. Furthermore, even if such a duty did exist public policy required that the police should not be liable in such circumstances. It followed that the chief constable could not be liable in damages for negligence because of failure of the police to detect S before he murdered the appellant's daughter. The appeal would therefore be dismissed.

An important observation has been made by Lord Keith of Kinkel at p 240 where he said:

> By common law police officers owe to the general public a duty to enforce the criminal law: see *R* v *Metropolitan Police Comr, ex p Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118. That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision on such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may in a position to have recourse to judicial review.

Needless to say that the *Hill* case[8] is clearly distinguishable for in that case the appellant was in fact trying to dictate the manner in which the police should carry out their duties.

Even if I am wrong in arriving at my conclusion as stated above I am satisfied that the second attack mounted by the plaintiff in his pleadings amounted to an allegation of negligence on the part of the defendants in the performance of their duties which they owed to the plaintiff under the principle as laid down in the leading case of *Donoghue* v *Stevenson*.[9] The averments in paras 5 and 6 are sufficient in my view to indicate that the plaintiff is relying on the element of negligence despite the fact that the word 'negligence' had not been asserted. The defendants could not have been caught by surprise by the omission of the word — see *Dutton* v *Bognor Regis Urban District Council*[10] at pp 391-392.

I am therefore more than convinced that the application of the defendants to strike out the statement of claim of the plaintiff cannot be sustained. I confirm that the decision of the SAR is correct. The defendants are required to pay the costs of this proceedings to the plaintiff.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

Reported by *Mathavan Devadas*